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No. 489

In the Supreme Court of the United States

October Term 1947.

MARY MORTON WEST, OSAGE ALLOTTEE NO. 192,
Appellant,
vs.
OKLAHOMA TAX COMMISSION.

Appeal from the Supreme Court of the State of Oklahoma.

BRIEF of APPELLANT.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1947.

No. 489

MARY MORTON WEST, OSAGE ALLOTTEE NO. 192,

Appellant,

vs.

OKLAHOMA TAX COMMISSION.

BRIEF *for* APPELLANT.

Opinion Below.

The Oklahoma Tax Commission, where the case originated, did not hand down an opinion, but entered an order from which an appeal was taken to the Supreme Court of Oklahoma (R. 15). The Supreme Court of Oklahoma handed down two opinions, the first of which was superseded by the second. Neither of said opinions appears in the official Oklahoma Reports, but both, together with a dissenting opinion, are printed in full in the transcript (R. 32, 39).

Jurisdiction.

The opinion and decision of the Supreme Court of Oklahoma was entered on October 28, 1947. Petition for allowance of appeal was filed and order allowing appeal entered on November 24, 1947. The decision below upheld the valid-

ity of the estate or inheritance tax law of the State of Oklahoma as applied to restricted Osage Indian estates, against the contention that as so applied the statute was repugnant to the Fourteenth Amendment to the Constitution of the United States, to an Osage treaty, and to laws of the United States relating to the Osage Tribe of Indians. The jurisdiction of this court rests upon Section 237(a) of the Judicial Code, as amended by the Act of February 13, 1925, and the Act of January 31, 1928 (28 U. S. C., Secs. 344 (a) 861a).

Statement.

This appeal presents the question of the right of the State of Oklahoma to levy an estate or inheritance tax against the estates of restricted Osage Indians, and more specifically the right to include in the estate as the measure of such tax property the title to which rests in the United States in trust for the Osage Tribe of Indians, and in which the restricted Osage Indian had no vested interest at the time of death.

The Oklahoma Tax Commission entered an order levying the tax (R. 8), and to such order a protest was filed raising the Federal question (R. 9). After hearing upon the protest the Commission again entered an order assessing the tax (R. 15), including in the net estate as the measure of the tax all items of property making up the estate, except the homestead.

By stipulation filed in the case (R. 12) it was agreed that the estate consisted of the following items of property:

1 and 919/2520ths Osage Indian mineral headrights	$ 10,235.12
(Never subjected to state taxation.)	
Trust funds in U. S. Treasury	4,745.52
Accrued interest thereon	398.90
(Neither ever subjected to state taxation.)	
Surplus funds in U. S. Treasury	29,046.27
(Never subjected to state taxation.)	
United States bonds, value at death	70,949.31
(Purchased with restricted funds and held by the United States in its treasury from funds accumulated from mineral headrights. Never subjected to state taxation.)	
Building and loan stock (purchased as bonds, *supra*)	1,485.06
(Never subjected to state taxation.)	
Real estate other than homestead in Osage County	12,226.10
(Taxed.)	
3/28ths interest in Masonic mortgage	1,071.43
(Purchased as bonds, *supra*. Never subjected to state taxation.)	
Purchased real estate in Osage County	5,000.00
(Taxed.)	
Tax exempt homestead	1,833.33
Restricted household furniture	736.00
(Purchased with funds accumulated from headrights. Not taxed.)	

It was further agreed by the stipulation that "Osage funds are paid to the United States Treasury and held by it undesignated as to members of tribe but simply as the Osage Tribal Trust Fund." (R. 13)

From the order of the Commission assessing the tax

an appeal was prosecuted to the Supreme Court of Oklahoma, where a petition in error was filed, again raising the Federal question (R. 1). That court, on October 28, 1947, handed down an opinion upholding the validity of the Oklahoma estate or inheritance tax statute as applied to all items of property composing the estate, except the homestead. From that decision this appeal is prosecuted.

The material parts of the Oklahoma statute (Secs. 988 to 989t, inclusive, Title 68, Oklahoma Statutes 1941) are as follows:

Section 989:

> "A tax, at the rates prescribed in Section 2 of this act, is hereby levied upon the transfer of the net estate of every decedent, whether in trust or otherwise, to persons, associations, corporations, or bodies politic, of property, real, personal, or mixed, whether tangible or intangible, or any interest therein or income therefrom, by will or the intestate laws of this state by any order setting apart property and/or granting family allowance pursuant to the probate code, by deed, grant, bargain, sale, or gift made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or after such death, whether made before or after the passage of this act. * * *"

Section 989e:

> "(A) The value of the gross estate used as a basis for the determination of the value of the net estate, shall be determined by including:
>
> "(1) The value at the time of the death of the decedent of all property, real, personal, or mixed, whether tangible or intangible, of which the decedent died seized or possessed, within the jurisdiction of this state, and any interest therein or income therefrom,

including the homestead in excess of Five Thousand ($5,000.00) Dollars, which shall pass to any person or persons, associations or corporations, in trust or otherwise, by testamentary disposition or by the laws of inheritance or succession of this or any other state or country,"

Section 989i:

"Taxes levied under this act shall be and remain a lien upon all the property transferred until paid, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of administration, allowed by the court having jurisdiction thereof, shall be divested of such lien. * * *"

History of Osage Treaties, Laws and Property.

By the Treaty of 1866 between the United States and the Cherokee Nation of Indians, (14 Stat. L. 799) the Cherokees ceded to the United States approximately one and one-half million acres of land lying north and east of the Arkansas River in Oklahoma, comprising what is now known as Osage County. Pursuant to that treaty, and in 1883, a deed was made and executed, with the Cherokees as first party and the United States as second party, by the granting clause of which it was provided that the first party,

"does by these presents grant, bargain, sell, remise, release, relinquish and confirm unto the said party of the second part, forever, in trust nevertheless and for the use and benefit of the said Osage and Kansas Indians,"

the lands above referred to and other lands. This deed is recorded in Book 6, page 482, Indian Deed Record, Department of the Interior, Washington, D. C.

By Act of Congress approved June 28, 1906 (34 Stat. L. 539) the surface only of the Osage lands was alloted in

severalty, whereby each of the 2,229 enrolled Osages received a homestead allotment of 160 acres and three allotments of surplus lands totaling 497 acres. That act provided for the issuance of certificates of competency, in the discretion of the Secretary of the Interior, and that upon the issuance of such certificate the surplus allotted lands should become subject to taxation, with the further proviso that such surplus lands should remain non-taxable for a period of three years except where a certificate of competency was issued or the allottee died. The homestead allotment was made non-taxable for a period of twenty-five years, or during the life of the homestead allottee.

It was further provided by that act that the oil and other minerals covered by the allotted lands were reserved for the use of the tribe for a period of twenty-five years, and that the same should become the property of the individual owner of the land at the expiration of the twenty-five year period, "unless otherwise provided for by Act of Congress."

The act further provided that all funds belonging to the Osage Tribe, and all moneys due or that might become due, should be held in trust by the United States for a period of twenty-five years from the first day of January, 1907. Provision was also made in that act for quarterly payment to the allottee of the interest on his *pro rata* share in the tribal funds, but there was no provision for the payment of the principal until the expiration of the trust period.

By successive acts of Congress referred to later in this brief this trust period has been extended to April 8, 1983, on the minerals, and to January 1, 1984, on lands, moneys, and other properties.

By the seventh paragraph of Section 2 of the Allotment Act (34 Stat. 539) it was provided:

"• • • That nothing herein shall authorize the sale of the oil, gas, coal, or other minerals covered by said lands, said minerals being reserved to the use of the tribe for a period of twenty-five years, and the royalty to be paid to said tribe as hereinafter provided; And provided further, That the oil, gas, coal and other minerals upon said allotted lands shall become the property of the individual owner of said land at the expiration of said twenty-five years, unless otherwise provided for by Act of Congress."

Section 5 of said act provides:

"That at the expiration of the period of twenty-five years from and after the first day of January, nineteen hundred and seven, the lands, mineral interests, and moneys, herein provided for and held in trust by the United States shall be the absolute property of the individual members of the Osage Tribe, according to the roll herein provided for, or their heirs, as herein provided, and deeds to said lands shall be issued to said members, or to their heirs, as herein provided, and said moneys shall be distributed to said members, or to their heirs, as herein provided, and said members shall have full control of said lands, moneys, and mineral interest, except as hereinbefore provided."

By Act of Congress approved March 3, 1921, (41 Stat. 1249), the trust period was extended to 1946, and by Act of Congress approved March 2, 1929 (45 Stat. 1478), the trust period was again extended to 1958. The last extension was by Act of Congress approved June 24, 1938, (52 Stat. 1034), the material parts of Section 3 thereof being as follows:

"That all that part of the Act of June 28, 1906 (34

Stat. L. 539) * * * which reserves to the Osage Tribe the oil, gas, coal, or other minerals, covered by the lands for the selection and division of which provision is made in that act is hereby amended so that the oil, gas, coal, or other minerals covered by said lands are reserved to the Osage Tribe, until the 8th day of April, 1983, unless otherwise provided by Act of Congress * * *.

"The lands, moneys, and other properties now or hereafter held in trust or under the supervision of the United States for the Osage Tribe of Indians, the members thereof, or their heirs and assigns, shall continue subject to such trusts and supervision until January 1, 1984, unless otherwise provided by Act of Congress."

By Section 3 of the Act of Congress approved March 3, 1921 (41 Stat. L. 1249) it was provided:

"That all members of the Osage Tribe of Indians are hereby declared to be citizens of the United States, but this shall not affect their interest in tribal property or the control of the United States over such property as is now or may hereafter be provided by law * * *."

Specification of Errors.

I. The Supreme Court of Oklahoma erred in affirming the order and judgment of the Oklahoma Tax Commission, for the reason that in applying the Oklahoma estate or inheritance tax law to the estate of a restricted member of the Osage Tribe of Indians and to property of such estate the title to which is in the United States in trust for such restricted Osage Indian the judgment of said court is in direct conflict with former decisions of the Supreme Court of the United States and of Federal District Courts and Circuit Courts of Appeals in similar cases.

II. Said court erred in affirming the order and judgment of the Oklahoma Tax Commission, for the reason that the United States Government holds the

property involved under a trust established by treaty and by Acts of Congress imposing upon the Government the duty to deliver the corpus of the trust property to the individual members of the Osage Tribe at the end of the trust period. Application of the Oklahoma estate or inheritance tax law to such property and the exaction of the tax thereby provided for would interfere with such governmental duty and diminish the trust estate.

III. Said court erred in affirming the order and judgment of the Oklahoma Tax Commission, for the reason that the corpus of such trust property does not become the property of the individual member of the Osage Tribe until the termination of the trust period, and the imposition of the Oklahoma inheritance or estate tax which includes in its measure property which was not the property of the decedent at the time of his death constitutes a denial of due process of law and of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

IV. Said court erred in affirming the order and judgment of the Oklahoma Tax Commission, for the reason that the immunity from state taxation of property held in trust by the United States for Osage Indians has never been withdrawn by Congress by any act granting express permission to the State of Oklahoma to levy the tax in controversy.

Inasmuch as our argument will follow closely the points presented by the above assigned errors, we feel that any effort at summarizing the argument to be made in this brief would be of little assistance to the court, and that we may best avoid unnecessary repetition by omitting a summary.

ARGUMENT.

I.

The decision below is legally erroneous and in irreconcilable conflict with prior decisions of this Court and other Federal courts.

In the opinion of the Supreme Court of Oklahoma it is said that, "We reject at once as untenable the assertion that the title to this property remained in the Federal Government under the various laws applicable to the Osages." This holding is contrary to the stipulation of the parties to the case, to the deed from the Cherokee Indians to the United States, to the Acts of Congress relating to the Osages, and to various decisions of the Federal Courts.

The stipulation provided (R. 13) that title to the mineral interest involved "has been, is and will be held in trust by the United States until 1984 or such further time as Congress may provide." As pointed out in the above statement of facts, the deed from the Cherokees to the lands comprising the present Osage reservation was to the United States as the party of the second part, in trust for the use and benefit of the Osage and Kansas Indians. The Osage Allotment Act, quoted from above, provided that the minerals underlying the Osage reservation were to be reserved to the use of the tribe for a period of twenty-five years and should become the property of the individual owner of the land at the expiration of such period, "unless otherwise provided by Act of Congress." The reservation of the minerals to the Osage Tribe has been extended until the 8th day of April, 1983 (52 Stat. 1034).

Under the 1906, or Allotment Act, there was a severance of the surface rights and the mineral interest, the

surface being allotted in severalty to members of the tribe and title to the mineral interest remaining in the United States in trust for the tribe. In *Taylor* v. *Tayrien*, 51 F. (2d) 884, a bankruptcy case, the Tenth Circuit Court of Appeals pointed out that the 1906 Act made no allotment of the mineral estate, but that it remained tribal property. In concluding that the Osage headright owned by the bankrupt did not pass to the trustee in bankruptcy, that court held that "an Osage Indian has no present property right in the properties now owned by the tribe."

In *McCurdy* v. *United States*, 264 U. S. 484, 68 L. ed. 801, this court held that the title to Osage lands was in the United States just prior to the time deeds were executed and delivered to the individual Indians, and since there has been no allotment of the mineral estate it necessarily follows that title thereto still remains in the United States.

In *Adams* v. *Osage Tribe of Indians*, 50 F. (2d) 918, certain owners of lands in Osage County, Oklahoma, sought to quiet the title to the oil, gas and other minerals under the lands owned by them. About the same time the United States brought a similar suit against the plaintiffs in the other cases, and on appeal to the Tenth Circuit Court of Appeals (*Adams* v. *Osage Tribe of Indians*, 59 F. (2d) 653) that court said in the opinion:

> "• • • The United States alleges that it is the owner of all of said minerals holding them in trust for the use and benefit of the Osage Tribe, having acquired the same by deed from the Cherokee Nation pursuant to certain Acts of Congress."

The court also pointed out that—

> "• • • The bills in the three suits were dismissed, and in the one brought by the United States decree was

entered adjudging the minerals to be the property of the Osage Tribe, title to which is held in trust by the United States for the tribe's use and benefit."

The decrees of the District Court were affirmed, thus approving the holding of the trial court that title to the minerals is in the United States. (Certiorari denied, 287 U. S. 652, 77 L. ed. 563.)

As to the "trust funds" involved, it will be noted that it is stipulated (R. 13) that "these funds have been held by the United States since before the Act of 1906 (34 Stat. 539), and have never been subjected to taxation." The trust under which these funds were held was provided for by treaty between the United States and the Great and Little Osage Indians entered into in 1865 (14 Stat. L. 687), by the terms of which the proceeds of the sale of Osage lands in Kansas were to be placed in the Treasury of the United States to the credit of the tribe. Provisions for the carrying into effect of the terms of this treaty were made by Act of Congress approved June 16, 1880. (21 Stat. L. 291)

Reference to the protest and to the stipulation filed in the case will disclose that all other items of personal property concerning which protest is made to the inclusion thereof in the gross estate for purposes of inheritance or estate tax consist either of funds accumulated from the headrights or mineral interests, or securities or other personal property purchased with such funds by the United States and held in the United States Treasury. (R. 9-12) It likewise will be seen that by the stipulation it is agreed that each of these items of personal property has never been subjected to taxation.

The case of *United States* v. *Thurston County*, 143

Fed. 287, was decided by the Eighth Circuit Court of Appeals a little more than three months prior to the passage of the Osage Allotment Act. In that case the United States had filed a bill to prevent Thurston County, Nebraska, from collecting taxes from certain Omaha and Winnebago Indians. In an opinion by SANBORN, C. J., it was held that not only was the land which had been held in trust by the United States exempt from all state and county taxes, but that the proceeds of the sales of such lands were subject to the same trust and therefore to the same rule of exemption. The court there said that, "The substitutes partake of the nature of the originals, and stand charged with the same trust." It is, therefore, the contention of the appellant in this case that the title to funds accumulating from the Osage mineral interest is likewise in the United States and charged with the same trust under which the minerals are held.

Furthermore, Section 4 of the Allotment Act, *supra*, provided that all such funds should be held in trust by the United States for a period of twenty-five years, and that period is now extended until January 1, 1984, unless otherwise provided by Act of Congress. (52 Stat. 1034, Sec. 3.)

Even the Supreme Court of Oklahoma has held that title to the income accruing to an Osage headright is in the United States. In *McKnight* v. *Panther*, 190 Okl. 127, 120 P. (2d) 973, that court held that a check drawn on the United States Treasury for a quarterly annuity payment to a half-blood Osage Indian having a certificate of competency was not subject to execution by a creditor of such Indian. In the opinion the court said:

> "At the time of the issuance of said check, title to the fund on which it was drawn was in the Federal Government as trustee for the Osage Tribe of Indians.

> The delivery of the check to the defendant did not transfer to him title to any portion of said fund. * * * The title to the fund still remained in the Government until such time as the check was presented for payment and properly cleared."

In view of the foregoing it is submitted that the holding of the court in the present case that title to the headrights, to the funds known as "trust funds," to funds accumulating in the United States Treasury from the Osage mineral interest, and to securities in which such funds have been invested by the United States is not in the United States is contrary to both fact and law. It is only these classes of property involved in the estate about which any contention is being made. It was agreed by the stipulation (R. 13) that none of these classes of property had ever been subjected to taxation. Those classes of property designated in the stipulation as "taxed" are conceded to be properly includable in the gross estate for purposes of estate or inheritance taxes, and our argument is addressed only to the other items.

We believe it is apparent from the opinion below that the Supreme Court of Oklahoma found it necessary to dispose of the question of title in the manner it did in order to hold the above classes of property taxable. If title thereto was and is in the United States, then decisions of this court and other Federal Courts seem to be an insuperable barrier to state taxation.

At this point attention should be called to certain definite and vital distinctions between the present case and the case of *Oklahoma Tax Commission* v. *United States,* 319 U. S. 598, 87 L. ed. 1612, inasmuch as the latter case involved the identical state statute here under consideration, but as

applied to property of members of the Five Civilized Tribes. We suggest the following points of distinction:

1. Title to all classes of property in controversy in this case is in the United States, while in the *Five Tribes* case the Indians involved owned in fee not only the surface of the land but the minerals as well.

2. By Act of Congress relating to the Indians involved in the *Five Tribes* case the minerals, including oil and gas, were made "subject to all state and federal taxes as provided in Sec. 3 of the Act approved May 10, 1928 (45 Stat. 495, c. 517)." (47 Stat. 777.) No such permission has ever been granted by Congress to the State of Oklahoma respecting the mineral interest of the Osage Tribe or tribal funds accumulating therefrom, and by stipulation in this case it has been agreed that the various classes of property involved have never been subjected to taxation. (R. 13)

3. The various classes of property involved in this case are held in trust. No transfer of the corpus takes place upon the death of a restricted Osage Indian. The sole and absolute control of the corpus of the trust property and of the duration of the trust period itself is in the trustee.

4. The classes of property involved herein are tribally owned. They do not become the "absolute property of the individual members of the Osage Tribe" until the termination of the trust period, as presently fixed or as may hereafter be further extended. (Section 5 of 1906 Act.) In contrast, the property involved in the *Five Tribes* case was individually owned.

5. In the *Five Tribes* case the Government advanced but two contentions, neither of which is being made in the present case. It was urged in that case (1) that Oklahoma did not intend to tax estates of members of the Five Tribes,

and (2) that restrictions placed by Congress on the alienation of Five Tribes property operated to exempt such property from the Oklahoma estate tax. We submit that the contentions made in the present case are far more serious and more substantial.

6. The classes of property involved herein being held in trust by the United States, the opinion in the *Five Tribes* case itself points to the distinction between that case and this. Referring to the lands of members of the Five Tribes the court said in that case that, "Their lands are held in fee, not in trust, as in the *Rickert* case." The doctrine of the *Rickert* case (*United States* v. *Rickert*, 188 U. S. 432, 47 L. ed. 532) clearly was not repudiated in the *Five Tribes* case, and would seem to be decisive if applied in the present case.

We therefore respectfully urge that the *Five Tribes* case is in no wise determinative of the present case.

We do not understand from the opinion of this court in the *Five Tribes* case that the court there treated or intended to treat the case of *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376, 82 L. ed. 907, as having discarded for all purposes the Federal instrumentality theory, nor do we believe the opinion in the *Mountain Producers Corp.* case may be so understood. In that case the court merely disapproved the prior expansion of the doctrine beyond its proper limits, and held that a tax laid upon the profits made by a lessee of Indian lands had only a remote, if any, "influence upon the exercise of the functions of government." The view we here express as to the scope of the holding in the *Mountain Producers Corp.* case finds ample support in the case of *United States* v. *Allegheny County*, 322 U. S. 174, 88 L. ed. 1209, decided some six years after the decision in

the *Mountain Producers Corp.* case. In the *Allegheny County* case the court held that, regardless of the fact that in such cases as *Mountain Producers Corporation* the court had sharply curtailed the doctrine of implied delegated immunity, it had never departed from the basic doctrine that the properties, functions, and instrumentalities of the Federated Government are immune from all forms of state taxation, nor had it wavered in its application.

The doctrine of the *Rickert* case, *supra*, that Indian property held in trust by the United States is constitutionally exempt from state taxation, was applied to Osage property in *McCurdy* v. *United States*, 264 U. S. 484, 68 L. ed. 801. In that case an effort was being made by the taxing officials of Osage County, Oklahoma, to tax Osage lands which had been allotted but deeds to which had not been signed and approved until after the taxing date of the year for which it was sought to levy the tax. Under these circumstances it was held:

> "Title was in the United States on the date as of which the assessment was made, and did not pass until the execution and delivery of the deeds (Sec. 8). The lands were not taxable while held in trust by the United States." (Citing the *Rickert* case.)

The *Rickert* case was also followed by the Eighth Circuit Court of Appeals in the *Thurston County* case, *supra*.

As late as 1943, in *Mahnomen County* v. *United States*, 319 U. S. 474, 87 L. ed. 1527, the doctrine of the *Rickert* case was mentioned without criticism but on the other hand with seeming approval.

On October 10, 1944, the Tenth Circuit Court of Appeals handed down an opinion in the case of *United States* v. *Board of Com'rs*, 145 F. (2d) 329. Writ of certiorari was

denied by this court January 29, 1945. In that case Fremont County, Wyoming, was seeking to tax certain lands which had been purchased with funds belonging to Indians. Title to the lands had been taken in the United States in trust for the Indians. It was held that where the legal title is in the United States lands are not subject to state or county taxes, even though the title is merely held in trust for an Indian or a tribe. The *Rickert* case and the *McCurdy* case, *supra*, were cited as authority. In distinguishing the case from the *Five Tribes* case and other similar cases the court said: "But in all of these cases title to the land was in the Indian, not the United States."

Likewise, in *United States* v. *Mummert*, 15 F. (2d) 926, the *Rickert* and *Thurston County* cases were distinguished on the ground that in those cases the legal title to the property sought to be taxed was in the United States, whereas, "In the case at bar the title is not in the United States, but directly in the Indians."

The opinion in the *Rickert* case was handed down in 1903. As before pointed out, twenty years before that time the lands comprising the Osage reservation, including the minerals thereunder, had been conveyed to the United States in trust for the Osage Tribe. The Allotment Act of 1906 expressly declared the trust character of "all funds belonging to the Osage tribe, and all moneys due, and all moneys that may become due." The opinion in the *Thurston County* case was handed down a few days prior to the approval of the Allotment Act, and the opinion in the *McCurdy* case in 1924. It thus appears that since these three opinions Congress has passed both the 1929 Act and the 1938 Act, each of which specifically declares that Osage property of the kind here under consideration shall continue subject to such trust.

Hence, in this case we are not dealing simply with congressional silence after judicial construction of a statute (*Helvering* v. *Hallock*, 309 U. S. 106, 84 L. ed. 604), but with the affirmative action of Congress in extending an active trust over Indian property after the courts had repeatedly declared that property so held in trust by the United States for Indians is exempt from state taxation. And while we would not be so presumptuous as to assert that this situation should "debar this court from reexamining its own doctrines" (*Helvering* v. *Hallock, supra*), we do submit that repeated re-enactment of the statute under such circumstances should be most persuasive of the view that Congress was satisfied with previous holdings of the courts that property the title to which is held in trust by the United States for Indians is not subject to state taxation.

The lower court appears to have been influenced largely by the fact that the restricted Osage Indian enjoys the income from the trust estate. However, in all of the Indian cases above discussed the beneficial interest in the property was in the Indian, but that fact was no obstacle to the application of the rule that property held in trust for Indians is not subject to state taxation. In the *Allegheny County* case, *supra*, it was pointed out that the contention there made, that the tax affected only private persons, was likewise made in *Van Brocklin* v. *Anderson*, 117 U. S. 151, 29 L. ed. 845, but that it was held that the immunity protected the private owner. Again in the *Allegheny County* case the court referred to the *Rickert* case as subsisting authority.

II.

The imposition of the tax in controversy would interfere with the Government's duty to the Osage Indians by diminishing the trust estate.

Section 4 of the Allotment Act (34 Stat. 539) provides that all moneys of the Osage Tribe of Indians shall be held in trust for a period of twenty-five years from January 1, 1907, and Section 5 provides that at the expiration of the trust period the properties so held in trust shall be the absolute property of the individual members of the tribe. Thus the Federal Government owes a solemn duty to the Osage Indians to deliver to them at the end of the trust period the trust estate unimpaired and undiminished. This it cannot do, if each successive time the corpus of the trust property theoretically passes from one Osage Indian to his heirs the State is permitted to dip into the corpus, or what is left of it after prior like exactions, and thus frustrate the fiat of Congress that the property "shall be the absolute property" of the individual Osage at the termination of the trust period.

We say "theoretically passes," because so far as the corpus of the trust property is concerned, all the restricted Osage Indian has, and all he passes on to his heirs, is the right to certain income from the trust estate so long as the property continues to be held in trust by the Federal Government. This was pointed out in *McCurdy* v. *United States*, 246 U. S. 263, 62 L. ed. 706, wherein Mr. Justice BRANDEIS, speaking for the court, said:

> "* * * If the Secretary refused to issue the certificate, the allottee would (unless the certificate were granted later) remain, until the end of the twenty-five year period, in the enjoyment of the income merely; and at the end of that period, he or his heirs, though

unaccustomed to the control of property, would get absolute dominion at one time over the (*a*) homestead, (*b*) surplus lands, (*c*) the trust fund ($3,928.50), and (*d*) his share of the interest in the oil, gas, coal and mineral rights."

Section 989f, Title 68, Oklahoma Statutes 1941, pro- s for the exemption from estate taxes of "property ing to the deceased by inheritance, legacy or gift from revious estate within five years prior to the death of deceased and upon which previous estate the full in- tance and transfer taxes had been paid." With the t period on the minerals presently extended until 1983 the trust period on all other classes of Osage property held in trust extended until 1984, it would be possible these classes of property to pass through as many as different Osage estates, and each successive estate not the benefit of the exemption provided for in the above tioned statute. Yet the heirs to not one of those estates cept the one at the end of the trust period at some whol- definite time in the future—would inherit or obtain by of the deceased any more than the right to receive the ne from the property during their lifetime. The suc- ve exactions of estate taxes under such circumstances d result in diminishing the trust estate and thus defeat bligation assumed by the Federal Government to de- the trust property to the Osage Indian or his heirs at nd of the trust period. We say the termination of rust period is wholly indefinite for the reason that Con- heretofore has three times extended the trust period, nay further extend it.

The Osage Allotment Act provided that accrued in- t and oil royalties should be paid to the Osages quar- (34 Stat. 539, Sec. 4; *Work* v. *United States, ex rel.*

Mosier, 261 U. S. 352, 67 L. ed. 693). By the 1921 Act, however (41 Stat. L. 1249), Congress provided that so long as the income should be sufficient the adult Osage Indian without a certificate of competency should be paid $1,000.00 quarterly. This provision continued until by the 1938 Act (52 Stat. 1034) Congress provided that where the restricted Osage had surplus funds in excess of $10,000.00 he is to be paid $1,000.00 quarterly, but if he has surplus funds of less than $10,000.00 he shall receive quarterly only his current income, not to exceed $1,000.00 quarterly.

Thus it will be seen that not only the distribution of the surplus but likewise distribution of the income from the tribal property is subject to the will of Congress. The present commuted value of an Osage headright, which includes the mineral interest, trust funds and interest on trust funds, and the right to participate in bonuses and royalties until the end of the trust period, certainly is not a proper yardstick by which to measure the value of that which a particular deceased restricted Osage Indian passes on to his heirs or the value of that which the heir receives, when in truth and in fact neither ancestor nor heir has any control over the corpus of the property, and participation in the income itself is subject to the will of Congress.

It would seem that the same rule that has been applied in bankruptcy proceedings involving Osage Indians would be applicable to taxation by the State of Oklahoma. The case of *In re Denison*, 38 F. (2d) 662, involved the bankrupt estate of a member of the Osage Tribe of less than half blood and having a certificate of competency. And even as to an Osage Indian of that class, in speaking of the effect of the issuance of a certificate of competency VAUGHT, D. J., said:

"This does not, even by implication, empower him to sell his interest in a trust estate. Congress has provided that at the termination of the trust period, whenever it may be, that the interest of the individual Indian shall be delivered to him intact. *United States* v. *Thurston County*, (C. C. A.) 143 F. 287. Could Congress do this if taxes could attach or if liens could attach by virtue of judgments and obligations of any character?"

We have set out the provision of the Oklahoma statute (Sec. 989i) providing for a lien of the taxes upon the property transferred. In our judgment the effort of the State to place a lien upon property in the hands of the general government, the title to which is in the general government, and which the general government holds in trust for an Indian tribe is directly contrary to the federal instrumentality theory.

In *United States* v. *Board of Com'rs of Osage County*, 193 Fed. 485, in holding that by the 1906 Act, Congress had removed the tax exemption from surplus Osage lands, COTTERAL, D. J., said:

"* * * By this holding, however, is not meant that the interest in the minerals reserved to the tribe is subject to taxation. Every sale of this interest is declared unauthorized, and it must be immaterial whether accomplished by the voluntary act of the allottee or by the involuntary process of taxation. The reservation of this interest for the use of the tribe is an instrumentality, not only employed by the United States in carrying out a governmental policy, but expressly reserved from sale for the period of 25 years. And this title and right of the tribe is not the subject of assessment, tax levy, or sale, and will not pass or be vested in any grantee by an attempted sale or transfer."

This holding of the District Court was approved by the

Eighth Circuit Court of Appeals in *United States* v. *Board of Com'rs,* 216 Fed. 883, 886, in the following language:

> "We agree with the views expressed by the trial court that oil, gas, coal, and other minerals contained in allotments to Osage Indians, do not pass by the allotment or become subject to taxation. They are expressly reserved to the tribe. This restriction is imposed by the nation. No act or omission of the Indians or of state authorities can impair it."

By analogy the cases of *Choate* v. *Trapp,* 224 U. S. 665, 56 L. ed. 941, and *Carpenter* v. *Shaw,* 280 U. S. 363, 74 L. ed. 478, are authority for the view that the undertaking of the trustee, the United States, that the classes of property in question "shall be the absolute property" of the individual Indian at the end of the trust period became a vested right in the Osage Indian which may not be impaired or taken away through the means of state taxation. While in the cited cases the vested right was to an express tax exemption, we urge the point that the result would be the same whether the tax infringed directly upon the vested right to tax exemption or upon the right to have the trust estate become the absolute property of the Osage or his heirs at the termination of the trust period—a period subject to continued extension by Congress.

Another analogous case is *United States* v. *Ferry County,* 24 F. Supp. 399. In that case the trust patent issued to the Indian declared that the United States would hold the land in trust for a period of twenty-five years, and at the end of the trust period would convey the land to the Indian by patent in fee "discharged of said trust and free from all charge and incumbrance whatsoever." The court held that "The United States as trustee may not liquidate the trust without the consent of the allottees."

No Act of Congress can be pointed to as giving to the State of Oklahoma permission to levy the tax in controversy, and under the doctrine of the above cases even Congress itself could not grant such permission and thus deprive the Osage Indian of his vested right to have the corpus of the trust property delivered to him or his heirs at the termination of the trust period.

It will be seen that the Supreme Court of Oklahoma in its opinion placed a great deal of emphasis upon what was said to be the fact that the Federal Government collects an estate tax upon Osage estates, and it is intimated in the opinion that the record in the cases indicates that such is the fact. There is nothing in the record to show that the Federal Government collects such a tax, and no decision of any court involving the question can be pointed to as holding that the United States has the right to collect such a tax upon Osage estates. If officials of the Federal Government are collecting such a tax on Osage estates and including in the gross estate as a part of the measure of the tax property of the classes under consideration in this case, that fact alone is not conclusive of their legal right so to do. For some years federal tax-collecting officials collected a federal income tax from restricted Osage Indians, until the Tenth Circuit Court of Appeals, in *Blackbird* v. *Commissioner of Internal Revenue*, 38 F. (2d) 976, held that the income of such Indians is not liable for federal income tax. Since that decision the Treasury Department has reimbursed restricted Osages for huge sums collected as income taxes prior to the decision.

Nor would it necessarily follow, as concluded in the opinion below, that if the Federal Government has the right to collect such a tax, the State of Oklahoma has an equal

right. In *New York* v. *United States*, 326 U. S. 572, 577, 90 L. ed. 326, 331, it was pointed out that:

> "* * * The considerations bearing upon taxation by the states of activities or agencies of the Federal Government are not correlative with the considerations bearing upon Federal taxation of state agencies or activities. The Federal Government is the government of all the states, and all the states share in the legislative process by which a tax of general applicability is laid. 'The taxation by the state governments of the instruments employed by the general government, in the exercise of its powers,' said Mr. Justice BRADLEY, 'is a very different thing. Such taxation involves an interference with the powers of a government in which other states and their citizens are equally interested with the state which imposes the taxation'."

By the Oklahoma Enabling Act (34 Stat. L., pp. 267-278) it was provided that in the Constitution of Oklahoma thereafter to be adopted nothing therein contained should be construed to limit or affect the authority of the Government of the United States to make any law or regulation respecting Oklahoma Indians, their lands, property or other rights by treaties, agreement, law or otherwise. Hence the State of Oklahoma is in no position to question the authority of the United States to continue to hold the restricted Osage's property in trust, to extend the trust period from time to time, and to undertake to deliver such property to the Osage Indian or his heirs at the end of the trust period.

III.

As applied to the classes of Osage property in controversy, the Oklahoma inheritance or estate tax law results in a denial of due process of law and of the equal protection of the laws.

The classes of property which we contend are not properly includable in the gross estate for estate tax purposes, as they appear in the stipulation (R. 13) may be stated briefly as follows:

1. Osage headrights.

2. Trust funds.

3. Surplus funds, being accumulated income from headrights.

4. United States Bonds, other securities and other personal property purchased and held by the United States from surplus funds.

It is our contention that owing to the trust under which these classes of property are held, the corpus thereof is not owned by the restricted Osage Indian in such sense that it is properly includable as a part of his gross estate for estate tax purposes. Under the trust period as now extended the Osage mineral estate does not become the property of the individual Osage until the 8th day of April, 1983, and other properties and moneys now held in trust until January 1, 1984. In *Hoeper* v. *Tax Commission*, 284 U. S. 206, 76 L. ed. 248, this court said, "That which is not in fact the taxpayer's income cannot be made such by calling it income." So it likewise may be said that the corpus of property which is not in fact the taxpayer's cannot be made such by giving to the taxpayer or the taxpayer's ancestor the right to make a will, when in fact all that passes by the will of the deceased person, or all that descends from him under

the law of succession, is the right, not to the corpus, but merely to certain income therefrom dependent upon the will of Congress.

The first Oklahoma inheritance tax statute was enacted in 1915 (Session Laws of 1915, chapt. 162). Thus, before Oklahoma became a state, and long before the State had an inheritance tax law of any kind, Congress had provided that the classes of property under discussion should become the absolute property "of the individual members of the Osage Tribe * * * or their heirs" at the expiration of the trust period. The decedent in the present case did not create the trust. No transfer of the corpus of the trust property was effected by his death. As said by Mr. Justice HOLMES, speaking for this court in *Brooke* v. *City of Norfolk*, 277 U. S. 27, 72 L. ed. 767,

> "* * * The assessment is a bare proposition to make the petitioner pay upon an interest to which she is a stranger. This cannot be done."

We are not here dealing with a transfer in trust with reservation of a life income to the settlor. In a recent decision by the Supreme Court of Oklahoma (*In re Protest of Bass*, 18 Oklahoma Bar Journal, 1793; not officially reported) it was held that the corpus of trust property is includable for inheritance tax purposes where the decedent, in setting up the trust, had retained for himself the income from the property during his lifetime. But the Oklahoma statute is directed at such transfers only where the decedent created the trust and reserved to himself a life income from the property, or in other words, at *inter vivos* transfers resorted to as substitutes for wills. The Oklahoma statute does not, and we know of no statute anywhere that does, undertake to require the inclusion in the gross estate for inheritance tax purposes of the corpus of trust property

where the trust was created by the United States Government and where the ultimate transfer of the corpus is postponed until the indefinite termination of the trust period—indefinite because wholly dependent upon the will of Congress. Nevertheless, the statute has been so applied, and we think the application is in direct violation of the Fourteenth Amendment to the Constitution of the United States.

In the case *In re Protest of Bass, supra,* the Supreme Court of Oklahoma stated that:

> "In 1933, soon after the decision in *May* v. *Heiner* was rendered, the Oklahoma Legislature amended the law so as to levy the inheritance or succession tax upon transfers 'where the decedent reserved to himself, during his life, the income from property included in any such transfer'."

As pointed out above, the decedent in the present case did not make a reservation of income to himself, and the statute therefore does not purport to cover the estate involved herein.

There seems to be divergence of opinion as to whether *May* v. *Heiner,* 281 U. S. 238, 74 L. ed. 826, was overruled or departed from in *Helvering* v. *Hallock,* 309 U. S. 106, 84 L. ed. 604 (see *Helvering* v. *Proctor,* 140 F. (2d) 87), but as we understand *Helvering* v. *Hallock,* the only departure from the doctrine of *May* v. *Heiner* was because of the effect of the Joint Resolution of Congress of March 3, 1931, chap. 454, 46 Stat. at L. 1516. The basic doctrine of that case still would apply in the present case, since the statute under consideration does not purport to cover a situation such as that here involved; nor, in our judgment, would it be within the constitutional power of a state to enact an inheritance tax law which would require the inclusion in the

estate of a decedent for estate tax purposes of property not that of the decedent.

The proposition being urged under this point of our brief, it will be observed, is not an Indian question. The tenure of Osage property of the classes being discussed is comparable to a situation where successive life estates might be left to successive life tenants, with no power in the life tenant to sell, appropriate to his own use, or control in any manner the ultimate disposition of, the corpus of the property itself. Under such circumstances, upon the death of a particular life tenant, whether Indian or white, his interest in the property, as said in *May* v. *Heiner*, would be "obliterated by that event." Regarding Osage property the court pointed out in *Taylor* v. *Tayrien, supra*, that, "The right to control descent, either with or without a will, has been exercised by Congress, and may be further exercised."

In *Commissioner* v. *Irving Trust Co.*, 147 F. (2d) 946, the Circuit Court of Appeals, Second Circuit, said:

> "We have found no decision in which a settlor has parted with power to control the application of any part of the corpus and the disposition of it is left to the judgment of the trustee, independent of any prescribed standards, and yet the corpus has been included in the estate because the settlor might receive a part of the corpus through the exercise of an uncontrolled discretion by the trustee."

Under Section 3 of the Act of Congress approved March 2, 1929 (45 Stat. 1478) the Secretary of the Interior may, in his discretion, pay all or any part of the funds of a restricted Osage to him upon his application therefor, but the Indian has absolutely no control of this discretion, and the right given the Secretary by Congress but serves to empha-

size the fact that the funds are still subject to the trust and that the Indian has no independent control over them.

In the *Irving Trust Co.* case, *supra*, it was further held that the joint resolution of March 3, 1931, which this court said in *Helvering* v. *Hallock* displaced the construction in *May* v. *Heiner* and similar cases, did not operate retroactively. Prior to the decision in the *Irving Trust Co.* case this court had stated that by well settled rules of statutory construction, "a law is presumed, in the absence of clear expression to the contrary, to operate prospectively; that, if doubt exists as to the construction of a taxing statute, the doubt should be resolved in favor of the taxpayer." *Hassett* v. *Welch*, 303 U. S. 303, 82 L. ed. 858. The Second Circuit Court of Appeals again applied the rule in the more recent case of *Commissioner* v. *Singer's Estate*, 161 F. (2d) 15, holding that "the 1931 joint resolution of Congress and the amendment of 1932 to Sec. 811(c) specifically reaching transfers where the grantor has reserved a life estate have only prospective application."

Therefore, inasmuch as the trust provided for by Osage treaty and laws was created long before Oklahoma had an inheritance or estate tax law of any kind, it would be going to the extreme to say that the present Oklahoma inheritance tax law should have retroactive operation upon restricted Osage trust estates. *Nichols* v. *Coolidge*, 274 U. S. 531, 71 L. ed. 1184.

In *Globe Indemnity Co.* v. *Bruce*, 81 F. (2d) 143, 148, the Circuit Court of Appeals, Tenth Circuit defined an Osage headright as follows:

> "* * * The right to receive the trust funds and the mineral interests at the end of the trust period, and during that period to participate in the distribution of the bonuses and royalties arising from the mineral es-

tates and the interest on the trust funds, is an Osage headright."

The surplus funds, accumulated from income from the Osage tribal mineral interest, and securities purchased and held by the United States from such surplus funds partake of the same character as the mineral interest itself and the original trust funds. All continue to be held in trust until the termination of the trust period, and no provision of any law or regulation can be pointed to as giving to the restricted Osage Indian the absolute control of such property, or the right to pass to his devisee by will or his heir by descent the ultimate, absolute control and ownership of such property. As well said by the Circuit Court of Appeals, Fourth Circuit, in *Mullikin* v. *Magruder,* 149 F. (2d) 593, 597:

> "* * * The true test is whether under the terms of the conveyance full and complete dominion over the property by the transferee in a practical sense is established by the transferor's death."

Before leaving this point we call attention to the fact that by Section 3 of the Act of Congress of March 3, 1921 (41 Stat. L. 1249), hereinbefore quoted, Congress was careful to provide that the conferring of citizenship upon the Osages should not affect "their interest in tribal property or the control of the United States over such property as is now or may hereafter be provided by law." In other words, tribal property was to remain tribal property, subject to present and future Federal control. Certainly this renders unassailable the holding of the court in *Taylor* v. *Tayrien, supra,* that "an Osage Indian has no present property right in the properties now owned by the tribe."

IV.

The immunity from State taxation of the classes of property involved has never been withdrawn by Congress.

The various Acts of Congress relating to the Osage Indians and their property consistently have approached the question of State taxation from the angle of extending to the State of Oklahoma the right to tax, rather than from the angle of treating Osage property as subject to State taxation, but granting immunity in certain instances. This clearly appears in connection with the application of the Oklahoma gross production tax law and Section 5 of the Act of Congress approved March 3, 1921 (41 Stat. L. 1249).

In *Large Oil Co.* v. *Howard,* 63 Okl. 143, 163 Pac. 537, the Supreme Court of Oklahoma held that the Oklahoma gross production tax law applied to oil produced in Osage County, and was not objectionable because of the Federal instrumentality theory. However, this decision was reversed by this court by memorandum opinion on January 27, 1919 (*Large Oil Co.* v. *Howard,* 248 U. S. 549, 63 L. ed. 416). Rather promptly thereafter—on March 3, 1921—by Section 5 of the Act of Congress approved on that date, Congress provided "That the State of Oklahoma is authorized from and after the passage of this act to levy and collect a gross production tax upon all oil and gas produced in Osage County, Oklahoma," such tax to be "in lieu of all other state and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma." (41 Stat. L. 1249)

Thereafter the Oklahoma Legislature enacted a law providing for the levying of an excise tax of one-eighth of one cent per barrel on oil produced in Oklahoma, and the question of the validity of this law, as applied to oil pro-

duced in Osage County, came before both the Oklahoma Supreme Court (*Barnsdall Refineries* v. *Oklahoma Tax Commission*, 171 Okl. 145, 41 P. (2d) 918) and this court (*State of Oklahoma* v. *Barnsdall Refineries*, 296 U. S. 521, 80 L. ed. 366). Both courts held that the later Oklahoma statute was not within the Congressional consent to the levying of a gross production tax, and the opinion of this court definitely treated the 1921 Act of Congress as "removing the tax immunity," and as being a "waiver of tax immunity," to the extent and only to the extent provided by the act.

Just five weeks before the opinion below in this case the Supreme Court of Oklahoma handed down an opinion in *Texas Co.* v. *Oklahoma Tax Commission*, (18 Oklahoma Bar Journal, p. 1339; not yet officially reported) and by syllabus held:

> "A lessee producing oil from lands of restricted Kiowa and Apache Indians under departmental lease approved by and subject to supervision of the Secretary of the Interior of the United States, is engaged in the operation of a governmental instrumentality or agency and in the absence of permissive legislation by Congress, or appropriate Federal consent or waiver or withdrawal of immunity, the oil production or the oil as produced is not subject to the state excise tax of one-eighth of one cent per barrel, nor the state gross production tax of five per cent of the value of the oil produced."

The court in that case clearly adhered to the same view we are here presenting, as in the body of the opinion it is said:

> "And the United States Congress has acted on the theory that such immunity exists in the case of leases of this character unless waived. The Congress has adopted acts expressly waiving such immunity and granting to this state the authority to apply the gross

production tax as to certain designated Indian lands, the Osage Indian lands by Act in 1921 (41 Stat. at L. 1250), the Kaw Indian lands by Act in 1924 (43 Stat. at L. 176-177), and as to lands of the Five Civilized Tribes by Act in 1928 (43 Stat. at L. 496)."

At this point we again emphasize the distinction between the present case and the *Five Tribes* case (*Oklahoma Tax Commission* v. *United States*, 319 U. S. 598, 87 L. ed. 1612). In that case, by means of a footnote, it was pointed out that the 1933 Act of Congress relating to the Five Tribes provided:

"* * * That all minerals including oil and gas, produced from said land so acquired shall be subject to all State and Federal taxes."

Regarding this provision this court, in the case just cited, said:

"* * * Congress could not have intended that the minerals themselves should be subject to taxation, but that the proceeds of their sale, even further removed from the land itself, should be immune."

There is no such Act of Congress making the Osage mineral interest subject to any taxes whatever, other than the gross production tax, and this court has said that the Act of Congress authorizing that tax was a withdrawal of immunity to that extent, and that extent only. (*State of Oklahoma* v. *Barnsdall Refineries, supra.*) Any other view, we think, would be most illogical, as it is not to be assumed that Congress would engage in the wholly useless pastime of enacting a law giving the State permission to tax if there were no tax immunity to be waived. Furthermore, section 5 of the 1921 Act of Congress itself limited the scope of the permission granted to Oklahoma to tax by providing that the tax there authorized should be "in lieu

of all other State and county taxes levied upon the production of oil," etc.

It is clear from the opinion in *Mahnomen County* v. *United States*, 319 U. S. 474, 87 L. ed. 1527, that, wanting congressional consent, property held in trust by the United States for Indians is immune from state taxation. In that case the court said:

> "• • • The Clapp Amendment gives the consent of the United States to state taxation, thus removing the barrier to taxation found to exist in *United States* v. *Rickert*, 188 U. S. 432, 47 L. ed. 532, 23 S. Ct. 478, *supra;* but under *Choate* v. *Trapp*, the Indian who has gained a 'vested right' not to be taxed, must also consent."

In that case the court held the withdrawal of immunity effective solely because the Indian had consented thereto and there is no intimation in the opinion that the court disapproved the rule in the *Rickert* case.

We therefore respectfully urge that before the State is entitled to levy and collect an inheritance or estate tax in this case it must be able to point to express congressional consent thereto, and to this time no such consent has been given.

If we may be pardoned for repeating, we wish briefly again to emphasize the importance of the fact that, with the law apparently well settled by the *Rickert*, *Thurston County*, and *McCurdy* cases, *supra*, in all of which it was held that property held in trust by the United States for Indians is exempt from state taxation, Congress has upon three separate occasions—in 1921, 1929, and 1938—declared that the classes of Osage property here under consideration continue to be held in trust by the United States. We submi

that if there remains any life in the rule that re-enactment of a statute after judical construction thereof carries with it congressional approval of such construction, this would seem to be an entirely proper occasion for the application of the rule.

In this connection it is also significant that shortly after the decision of this court in *Large Oil Co.* v. *Howard, supra,* Congress withdrew existing immunity by passage of the 1921 Act permitting Oklahoma to levy and collect a gross production tax on oil and gas produced in Osage County, while on the other hand the Supreme Court of Oklahoma, in *Childers* v. *Pope,* 119 Okl. 300, 249 Pac. 726, (decided in 1926) held that property of a restricted Osage Indian held in trust by the United States was not includable in his estate for inheritance tax purposes, and Congress has never since that decision acted to withdraw the immunity there found to exist, but twice since that time has extended the trust period as to all classes of property in controversy in this case. It does seem that in the twenty-one years that have elapsed since *Childers* v. *Pope,* if Congress had been willing that Oklahoma collect an inheritance tax upon restricted Osage estates it would have said so, as it did with reference to the collection of a gross production tax.

Conclusion.

We urge that each of the reasons given above is sufficient to require a reversal of the judgment below. We are not confronted in this case with the question of the extent of congressional power to permit the State of Oklahoma to levy the tax in controversy, though as we have before intimated, we would seriously question such power to liquidate *pro tanto* the trust estate. The indisputable fact remains

that Congress has never at any time given its consent to the levying of the tax now sought to be exacted, and at least until such consent is given we believe it must be held that all of the classes of Osage property above discussed are immune from all forms of state taxation as long as *United States* v. *Rickert* and similar cases remain the law.

Respectfully submitted,

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